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No. 06-1501

Supreme Court, U.S.
FILED
JUN 14 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHERRI WILLIAMS; B.J. BAILEY; ALICE JEAN COPE; JANE DOE; DEBORAH L. COOPER; BENNY COOPER; DAN BAILEY; JANE POE; AND JANE ROE,

Petitioners

v.

TROY KING, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF ALABAMA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE FREE SPEECH COALITION and FIRST AMENDMENT LAWYERS ASSOCIATION In Support of Petitioners

(Filed with the Consent of All Parties)

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CORPORATE DISCLOSURE STATEMENT

Although not strictly required by Rule 29.6 or 37.5, the instant *amici* submit the following corporate disclosure statement:

Each of the *amici* is a nonprofit corporation. None has any parent corporation, and none has issued any stock. For this reason, no parent or publicly held company owns 10 % or more of the stock of any of the *amici* corporations.

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INTEREST OF *AMICI*

Amicus Free Speech Coalition is the trade association of the adult entertainment industry and is composed of businesses and individuals each of which is involved in some aspect of that industry. Its members include businesses which manufacture, distribute, advertise, and sell at retail sexual devices of the sort which the State of Alabama purports to prohibit or regulate. In addition, many of its members produce and disseminate sexually explicit but nonobscene expression which regularly depicts and describes the use of such devices by consenting adults.

Amicus First Amendment Lawyers Association is composed of attorneys whose practices substantially involve free expression matters including, in virtually every member's case, matters concerning sexually oriented expression. The members are also concerned with constitutional privacy rights surrounding consensual adult sexual activity because of the close practical and constitutional relationships between the protections for sexually explicit but nonobscene expression and for the discussion, advertising, dissemination, and use of sexual devices.

Petitioner Williams is, through her business, a member of *Amicus* Free Speech Coalition. None of the Petitioners is otherwise a member of any of the *amici*. Counsel for the Petitioners are among the approximately 200 members of the *Amicus* First Amendment Lawyers Association.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no one other than the instant *amici* and their counsel and members – *not* including Petitioners' counsel or Petitioner Williams (beyond her ordinary dues payment to FSC) – made any monetary contribution to the preparation or submission of this brief. *Cf.* Rule 37.6.

CONSENT OF THE PARTIES

All of the parties to this proceeding have consented to the filing of this brief, and the written consents thereof have been filed herewith. Rule 37. 2(a)

ARGUMENT IN SUPPORT OF THE PETITION

This Court has recently recognized that constitutionally protected privacy interests sharply limit the extent to which the government may regulate the ways in which an adult may engage in consensual intimate sexual relations with another adult. *Lawrence v. State of Texas*, 539 U.S. 558, 575, 578 (2003). *A fortiori*, those same interests protect adults in choosing to make simple mechanical sexual devices a part of their own private, intimate sexual activities – whether those activities are solitary or involve another consenting adult.

Indeed, private use of such devices is now widespread among adults across this nation in a variety of plainly legitimate circumstances. Edward O. Laumann, et al., *The Social Organization of Sexuality: Sexual Practices in the United States* at 162-65 (1994). Advertising for such devices is common in publications where the readership is likely to be interested, even including some popular magazines sold openly on many newsstand shelves, *e.g. Cosmopolitian* July 2007 at 220-21, and references – often quite casual – abound in such popular cultural fare as Hollywood motion pictures, *e.g. The Slums of Beverly Hills* (South Fork Pictures/Twentieth Century-Fox Film Corp. 1998). Beyond this, the use of such devices is now routinely depicted in much of the sexually explicit but nonobscene expression produced and disseminated in this country by many members of the *Amicus* Free Speech Coalition. And in this free enterprise economy, a substantial number of

manufacturers and distributors and a very large number of retail vendors actively and forthrightly serve the demand for such products. Many of them, too, are members of FSC. All of these users, distributors, and manufacturers of sexual devices are protected by the constitutional privacy rights long recognized by this Court. *Cf. Griswold v. State of Connecticut*, 381 U.S. 479, 485 (1965).

I. Constitutionally Protected Privacy Interests Surrounding Intimate Sexual Activity Prevent Governmental Interference With Adults' Choices to Make Sexual Devices Part of Their Intimate Sexual Activity.

For over four decades now, this Court has recognized that the Constitution protects a zone of individual privacy when it comes to decisions concerning consensual adult sexual activity. *Lawrence v. State of Texas*, 539 U.S. 558, 575, 578 (2003); *Griswold v. State of Connecticut*, 381 U.S. 479, 485 (1965). While this privacy interest was first conceived as applying primarily to the marriage relation, *Id.* at 486, *Id.* at 486-88, 495-96 (Goldberg, J., concurring), *Id.* at 500 (Harlan, J., concurring in judgment), *citing Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting), and to matters concerning procreative choices, *Roe v. Wade*, 410 U.S. 113, 153 (1973), it has not remained nearly so narrowly confined. *Eisenstad v. Baird*, 405 U.S. 438, 453 (1972)("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Lawrence* at 578 (those choosing to "engage[] in sexual practices common to a homosexual lifestyle . . . are entitled to respect for their private lives . . . [because] [i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter" (citation and internal quotation marks omitted)).

The precise focus of constitutional "privacy" analysis often shifts, sometimes *sub silentio*, from a predominant concern about secrecy, *see, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 344 (1995)(anonymous campaign leaflets protected against campaign financing disclosure requirements); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982)(anonymous contributions to unpopular political party protected against facially valid campaign financing disclosure requirements); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (membership list of controversial organization protected against compelled disclosure), to one of repose, *see, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988)(state may protect home against targeted residential picketing); *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970)(government may protect home against unsolicited, mailed pandering advertisements), *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952)(repose interest diminished on public bus), to one of autonomy, *Roe v. Wade*, 410 U.S. 113 (1973)(early-term abortion decisions protected against state prohibition). It may well be that these basic foci relate to one another in important ways, as a certain amount of secrecy may be necessary for genuine repose, and autonomy is often particularly important in areas which an individual largely shields from public view. But whatever their precise "spatial and more transcendent dimensions," *Lawrence* at 562, at any given moment, constitutional sexual privacy concerns predominately focus upon the *autonomy* of the adult individual in making decisions about consensual sexual activity. *See Lawrence* at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

In deciding *Lawrence*, this Court recognized that the zone of constitutionally protected privacy in sexual matters is broad enough to insure individual autonomy in the choice of a consensual adult sexual partner of the same or the opposite sex. *Id.* at 578. But since *Lawrence* effectively invalidated laws against *hetero*sexual as well as homosexual sodomy, *cf. Id.* at 575 ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn . . . to prohibit the conduct both between same-sex and different-sex participants"), it is critical, for present purposes, to recognize that constitutional sexual privacy considerations protect individuals in deciding not only upon a sexual partner, but *also* upon which consensual sexual activities they will engage in. *Id.* at 563 (reciting invalidated statute prohibiting oral and anal sex).[2] Under our Constitution, those decisions are left to the individual even as against the deliberate contrary collective conclusion of the political branches of government.

And if the choice to engage in the activities traditionally known as "sodomy," *cf. Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting), *quoting Herring v. State*, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904)("abominable crime not fit to named among Christians"), is constitutionally protected, so must the choice to use simple mechanical sexual devices part of sexual activity, either solitary or involving another consenting adult. All of the

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[2] It is worth noting, in this context, that the statute invalidated in *Lawrence* also purported to prohibit one's use of, *inter alia*, a sexual device to penetrate "the genitals or the anus of another person" but not one's own. *Id.* at 563.

legitimate governmental concerns[3] which might arise in connection with sexual activity between a couple – of the same or opposite sex – are altogether absent or dramatically attenuated in the context of masturbation. The risk of disease, for instance, could not be lower whether the masturbation in question is solitary or mutual with a partner. And for those whose personal circumstances, such as extended travel away from a monogamous partner, interfere with other consensual adult sexual activities, masturbation is now virtually universally recognized as a healthy sexual outlet. *E.g.* American Medical Association, Committee of Human Sexuality, *Human Sexuality* at 40-41 (1972). The same is true for adults whose more general circumstances leave them without a partner for longer periods of time. Surely, if the state cannot interfere with an adult's choice of a same- or opposite-sex sexual partner, it cannot interfere with that individual's choice to engage in sexual activities with no partner at all. Similarly, if the state cannot interfere with the choice of specific consensual sexual practices between two adult partners, it cannot prohibit their purely private and intimate use of mechanical sexual devices.

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[3] Not all government concerns, of course, are legitimate. It is now clear as a constitutional matter, for instance, that "the fact that a governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," *Lawrence v. State of Texas*, 539 U.S. 558, 577 (2003), *quoting Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)(Stevens, J., dissenting).

II. Millions of Adult Americans Use Sexual Devices as Part of Their Intimate Sexual Activities, and They Reasonably View Their Choice to Use Them as Part of Their Personal and Private Decision-Making Concerning Consensual Sexual Matters.

For quite some time, it has been clear that the use of sexual devices is widespread among consenting adults in the United States. Such devices were first commonly used in doctor's offices around the turn of the Twentieth Century to treat various "nervous" conditions. Rachel P. Maines, *The Technology of Orgasm: "Hysteria," the Vibrator and Women's Sexual Satisfaction* at 85-86 (1999). But they are now routinely employed by millions of adult Americans as part of a variety of consensual sexual activities. Over a decade ago, one comprehensive scientific study of sexual behavior found that roughly one in five or six adults in the United States (varying somewhat according to race, sex, and age) considered "using a dildo or vibrator" to be very or somewhat appealing to them. Edward O. Laumann, et al., *The Social Organization of Sexuality: Sexual Practices in the United States* at 162-65 (1994). More recently, a very different and more focused study noted that Americans acquired more than a million sexual devices were in 2005 alone. Michael Castleman and Amy Levinson, *Toys in the Sheets: The First Survey of Americans Who Use Sexual Enhancement Products* (Lawrence Research Foundation 1997). An even more recent media poll reports that 40 percent of its respondents had used vibrators to "spice up" their sex lives in the preceding year. *Elle*/MSNBC Poll, www.msnbc.com/id/12410076 (visited June 12, 2007). And, of course, the vast majority of the States have never bothered or have long ceased attempting to regulate such use by consenting adults.

In addition, sexual devices and their uses are now openly discussed in popular discussions of sexual activities and emotional health. Counselors and sex therapists regularly encourage such use, in appropriate circumstances, and they seldom believe that proper use of such devices by consenting adults is a matter of any concern. *E.g.* American Medical Association, Committee of Human Sexuality, *Human Sexuality* at 40-41 (1972)(recognizing as general proposition that masturbation is "neither physically nor mentally harmful"). Beyond this, such devices sometimes figure – often quite casually – in popular media such as motion pictures. For instance, several of the films listed on the Internet Movie Database with plot keywords including "dildo" or "vibrator" are major Hollywood motion pictures which achieved considerable mainstream popularity. *E.g. Not Another Teen Movie* (Columbia Pictures Corp.); *Slums of Beverly Hills* (South Fork Pictures/Twentieth Century-Fox Film Corp. 1998); *Animal House* (Universal Pictures 1978); *see generally* www.imdb.com (visited June 12, 2007). And in more sexually explicit fare, such as the nonobscene videos and DVDs produced by many members of *Amicus* Free Speech Coalition, the use and depiction of sexual devices often serves to enhance the erotic appeal of the expression.

Sexual devices are also widely advertised for sale in the United States. Again, such references are not restricted to catalogues focusing on sexually related items; advertisements also appear in more general popular magazines. *E.g. Cosmopolitian* July 2007 at 220-21; *Jane* June/July 2007 at 152; *Bitch: Feminist Response to Pop Culture* Spring 2007 at inside back cover; *Curve* June 2007 at 94; *Maxim* June 2007 at 88 (express reference to condom with a vibrating ring). And a substantial distribution of these devices now occurs – across the county, as in Alabama – through women-owned and -operated and women-centered boutiques and in private residential parties catering large-

ly to interested adult women. *See* Marty Klein, *America's War on Sex: the Attack on Law, Lust and Liberty* at 88-90 (2006). Many members of *Amicus* Free Speech Coalition advertise and sell sexual devices at retail. And several FSC members operate major manufacturing, warehousing, and distribution operations and transact many millions of dollars each year in order to serve the demand for sexual devices in the United States. *See* Scott Ross, *State of the Industry Report – 2006* (Free Speech Coalition White Paper, forthcoming July 2007) (Copy on file at FSC office).

III. Manufacturers, Distributors, and Retailers Are Free To Produce and Sell Sexual Devices in Order To Meet the Demand Generated by Adults Who Exercise Their Rights to Sexual Privacy.

Nothing in the tenor of the foregoing popular, commercial, or professional treatment of sexual devices and their use, *see supra* at 7-9, suggests that, in contemporary American society, the use of these devices by consenting adults is considered particularly peculiar or unusual. For present purposes, it is important to recognize that choices concerning the use of sexual devices are widely considered to be legitimate options among the many decisions which adult individuals legitimately make about sexuality *in general*. That recognition is critical in this context because constitutional sexual privacy concerns properly address individual autonomy at a fairly high level of generality. When this Court recognized in *Lawrence v. State of Texas*, 539 U.S. 558 (2003), that it had asked the wrong question in *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986)(asking "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .."), it precisely identified a problem which the Eleventh Circuit has now repeated below, *cf. Lawrence* at 567 (that [question], we now conclude, discloses the Court's own failure to ap-

preciate the extent of the liberty at stake"). If the historical and cultural assessment undertaken in connection with articulating the contours of the constitutional right to privacy is focused too narrowly, it will always "fail[] to appreciate the extent of the liberty at stake." Rather, *Lawrence* answered the proper question in terms of the autonomy accorded individual adults in reaching decision about their sexuality in general. *Cf. Id.* at 574 (noting that such decisions are among "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . .." (citation and internal quotation marks omitted)). In this broad sense, the right at issue here and fully recognized in *Lawrence* is no different than the autonomy right first recognized in *Griswold v. State of Connecticut*, 381 U.S. 479 (1965). The Court of Appeals erred below, in ranking this right so low in the constitutional hierarchy that it must yield to a State ban of the *sale* of sexual devices.

Griswold, of course, concerned sexuality as well as procreation. The married couples whose rights were there at issue *could* have avoided procreation without resort to any of the contraceptive devices made illegal under the challenged statute. As the Connecticut courts had previously noted, total abstinence was a possible solution which fully squared with the Connecticut statute and with many of the State policies supporting it. *Cf. Buxton v. Ullman*, 147 Conn. 48, 58, 156 A.2d 508, 514 (1959), *appeal dismissed sub nom. Poe v. Ullman*, 367 U.S. 497 (1961); *Tileston v. Ullman*, 129 Conn. 84, 92, 26 A.2d 582, 586 (1942), *appeal dismissed* 318U.S. 44 (1943). But the privacy interests protected in *Griswold* were strong enough to permit the married couple to reject abstinence as their only safe choice for avoiding procreation. The autonomy recognized in that case extended to sexual decision-making as well as to "family planning." Thus the State *statute*, not the individual sexual choices involved, had to bend in order to accommo-

date the conflicting interests and goals. Here too, it is no answer that individual adults may masturbate – alone or with another consenting adult – but they may not use illegal materials in doing so. Here, as in *Griswold*, so long as the sexual devices reached by the statute are used in private by consenting adults, the choice to use them as part of intimate sexual activity is left to the individual and not to the State.

The Court of Appeals appears to have recognized, however grudgingly, that constitutionally protected privacy rights extend to the private possession and sexual use of mechanical sexual devices by consenting adults. Once it is realized that this proposition is but one application of more general sexual privacy principles which this Court has recognized for decades, it becomes clear that the question of the commercial dissemination of sexual devices between consenting adults is already quite well settled.

In *Griswold v. State of Connecticut*, 381 U.S. 479 (1965), this Court recognized that married couples have a right to contraceptive devices in order to plan their families and control reproduction. But the parties there challenging Connecticut's contrary statute were *not* married couples desiring to practice birth control, but rather a physician and family planning clinic director seeking to counsel such couples and provide them with contraceptive devices. *Id.* at 480. Nevertheless, this Court set aside their criminal convictions in order to vindicate the rights of those whom they served. *Id.* at 480, 481 ("We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship"). Moreover, the fact that the physician and clinic director generally *sold* their services and products, *Id.* at 480, in no way limited – let alone completely voided – the constitutional protections involved. These principles are now quite well settled in the context of constitutional

privacy litigation. *E.g. City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983); *Carey v. Population Services, International*, 431 U.S. 678, 682-84 (1977). Similarly, the fact that manufacturers, distributors, and retailers – such as some of the Petitioners and many of the members of *Amicus* Free Speech Coalition – commercially serve a willing adult clientele which has the constitutional right to employ sexual devices a part of their own private, intimate sexual activities in no way limits the application of the constitutionally protected privacy interests here.[4]

Amici offer two brief additional observations from the First Amendment perspective which is so central to their concerns. First, although this Court has already drawn the necessary conclusions, in the privacy context, concerning commerce in such things as constitutionally protected

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[4] The government may certainly prohibit commerce in certain items. Even before the Thirteenth Amendment, for instance, some States (Alabama not among them) prohibited the sale of human beings as slaves. But slavery is outlawed altogether: one can no more give a slave as a gift to a friend than sell a slave to a stranger for a profit. Human organs present a somewhat different picture, though even here, the government could very likely prohibit the sale *and* gratuitous transfer of human organs directly between individuals without the involvement of medical personnel and facilities. Even as part of a regulated transplant regime, though, the government could prohibit the *sale* of human organs in order to prevent distorting effects which a market for very high-priced items would have on the choices – every bit as personal as those at issue here – of *donors* concerning whether to give up a functioning organ. Similar considerations may well underlie legitimate government prohibition of prostitution. In this case, however, the ban on commercial transactions hardly serves any interest in protecting the *sellers'* personal decision-making. And, to be clear, there is no sense here in which anyone is buying or selling sex itself. The use of sexual devices by consenting adults addressed herein presupposes that one or two adults are ready, willing, and able to engage in sexual activities. The only question here is whether they may buy devices designed to help them enjoy it.

contraceptive devices, it is worth noting that it has also recognized the connection between constitutional rights and commerce under the First Amendment's free speech clause as well. It has rejected as free speech violations, for instance, a state statute which would have prevented criminal convicts from being paid to author books. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 123 (1991). It has imposed substantial limits on the ability of government to regulate the payment of money to promote political ideas and campaigns. *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976). And it has rejected taxes which are targeted at the press. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227-31 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner or Revenue*, 460 U.S. 575, 582-83, 592-93 (1983). In each of these respects, this Court has properly recognized that in this free enterprise economy there are important connections between commerce and freedom.

Second, a look at the free expression situation concerning sexual matters indicates that the commerce of the sort at issue here can and does remain discrete, in the sense that it focuses upon consenting adults and largely avoids offending unwilling adults and confronting children. The State of Alabama could hardly suggest, for instance, that contraceptive devices cannot be advertised by any means and in any medium. Advertising of sexual devices can be – and largely is – voluntarily restricted to contexts where willing adults will see it and others, by and large, will not. The same is true of the commercial dissemination of sexually explicit but nonobscene expression. Its *sale* – as opposed to its gratuitous distribution – is not and could not be prohibited. But purveyors and consumers alike have found discrete commercial channels though which constitutionally protected expression may flow reasonably freely between consenting adults without unnecessarily confronting or disturbing children or

unwilling adults. There is certainly no reason why the commerce at issue here cannot and will not be so discretely conducted and carefully controlled.

No one in this case seriously disputes that the constitutional right to privacy recognized in *Lawrence* is the right at issue here. Whether rooted in the due process clauses, *Lawrence*, 539 U.S. at 578; *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in judgment), in the Ninth Amendment, *Id.* at 484; *see also Id.* at 488-93 (Goldberg, J., concurring), or in the "penumbras, formed by emanations" from several of the Bill of Rights amendments, *Id.* at 484, that right is, for the foregoing reasons, essentially identical to the constitutional privacy right first articulated in *Griswold*. Whether it should be called "fundamental" and invoke "strict scrutiny" or whether it might occupy some slightly different place in the semantic universe or the constitutional hierarchy, as the Petitioners suggest in the alternative, Pet. at 21-24, some stark, simple facts remain: That right was strong enough to invalidate long-standing criminal prohibitions on the sexual practices once known as "sodomy." That right is an integral part of the right which was strong enough to invalidate Connecticut's criminal ban on, *inter alia*, the *sale* of contraceptive devices. Such a right is surely strong enough to invalidate the State of Alabama's intrusion into its residents' bedrooms and into their most private intimate relationships.

CONCLUSION

The foregoing considerations demonstrate the widespread interest in and importance of the constitutional privacy concerns at issue in this case. *Amici* and their members urge this Court to recognize and apply constitutional protections in light of our contemporary culture. For these reasons, they respectfully submit the foregoing additional considerations in support of instant petition for a writ of certiorari.

Respectfully submitted,

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